

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08-EDC-0149**

FINAL DECISION ORDER OF DISMISSAL

STANDARD OF REVIEW

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Further, regarding matters under the Individuals with Disabilities Education Act, “failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines” for the resolution process and due process hearing until the meeting is held. The local education agency may, at the conclusion of the resolution period, request that a hearing officer dismiss the parent’s due process complaint. 34 C.F.R. § 300.510 and § 300.532

FINDINGS OF FACT

1. Respondent Wake County Board of Education is a local education agency (LEA) receiving funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (IDEA) and is responsible for providing special education to *Student* pursuant to Article 9, Chapter 115C, of the General Statutes.
2. Petitioner *Student* is a student at *CC Middle School* in Garner, North Carolina. His area of eligibility under the IDEA is Other Health Impairment.
3. On December 14, 2007, *Student* was suspended for 10 schools days with a recommendation for long-term suspension. On January 7, 2008, a manifestation determination review concluded that the conduct for which *Student* was suspended did not constitute a manifestation of his disability.
4. On January 17, 2008, and pursuant to the IDEA and N.C. Gen. Stat. § 115C-109.6, *Parent* filed a Petition for Contested Case Hearing at the Office of Administrative Hearings (OAH) on behalf of *Student* challenging the manifestation determination. A copy of the Petition was received by Superintendent Del Burns on January 30, 2008.
5. To date, the parties have been unsuccessful in conducting the resolution meeting required under 20 U.S.C. § 1415(f)(B) and N.C. Gen. Stat. § 115C-109.7. On February 1, 2008, *S.W.*, Senior Administrator for the Wake County Public Schools, left a message for *Parent* on the telephone number listed on the petition, as well as another message on the telephone number listed in Respondent’s school district locator, to attempt to schedule the Resolution Session. She again called and left similar messages on February 4th, having not heard back from *Parent*.
6. On February 6th, *Parent* and *Ms. S.W.* confirmed via e-mail the time and place of the resolution session, scheduled for February 7th. Approximately 90 minutes in advance of the meeting, *Parent* canceled the meeting and asked that the meeting be rescheduled due to inadequate time to prepare.
7. District personnel have unsuccessfully attempted to reschedule the resolution meeting and have indicated their interest in mediation in the event the resolution meeting does not fully resolve the dispute raised in this matter. Although *Parent* has expressed to District personnel a willingness and interest in participating in the resolution meeting and/or

mediation process, District personnel have been unable to schedule the resolution meeting with *Parent*. At no time has *Parent* indicated, either in writing or orally, that she wishes to waive participation in the resolution meeting.

8. On February 8, 2008, the undersigned Administrative Law Judge entered an Order Setting Hearing and General Pre-Hearing Order, which calendared this matter for hearing on February 19, 2008, and scheduled the Pre-hearing conference for February 14, 2008, at 1:30 p.m. These timelines were set to comply with requirements regarding an expedited due process hearing. Copies of the Order were mailed to *Parent* and to counsel for Respondent.
9. On February 12, 2008, Respondent filed its Resolution Meeting Status Report and Motion to Stay Proceedings, requesting that this action be stayed until such time as the parties mutually agree to waive the resolution meeting or the resolution meeting is held.
10. The OAH reached *Parent* by telephone on February 12th to verify that she had received notice of the Pre-hearing conference scheduled for February 14th and to inform *Parent* that the Pre-hearing conference would be conducted telephonically. As relayed to the Undersigned's legal assistant, *Parent* confirmed her availability and intent to participate in the Pre-hearing conference.
11. Pursuant to the Order Setting Hearing and General Pre-Hearing Order, the OAH attempted to reach the parties by telephone at 1:30 p.m. on February 14th for the Pre-hearing conference. Although counsel for Respondent was available, the OAH tried unsuccessfully to contact *Parent* for approximately 30 minutes. The calls placed by the OAH to *Parent* were made using the number listed on her Petition for a Contested Case Hearing, the same number the OAH had used to reach her on February 12th.
12. Following the OAH's repeated, unsuccessful efforts to contact *Parent*, the Undersigned opened the Pre-hearing conference, including consideration of Respondent's Motion For Stay. During the Pre-hearing conference, counsel for Respondent made an oral Motion to Dismiss the Petition for Contested Case Hearing based on *Parent*'s failure to prosecute her claims.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this matter and over the parties pursuant to N.C. Gen. Stat. § 115C-109.6.
2. In accordance with 34 C.F.R. § 300.532 whenever an expedited due process hearing is requested, the parties "must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.507 and 300.508(a) through (c) and §§ 300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this

section.” Paragraph (c)(2) through (4), as relevant in this matter, modifies the timelines found in § 300.510 to comport with expedited hearings. In all other regards Section 300.510 applies fully to discipline procedures and expedited due process hearings.

3. Section 300.510 requires in part that “failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines” for the resolution process and due process hearing until the meeting is held. The section also allows for the local education agency request that a hearing officer dismiss the parent’s due process complaint.
4. Respondent has made reasonable efforts to obtain the participation of *Parent* in a resolution meeting as required by 34 C.F.R. § 300.510 and § 300.532. Notwithstanding Respondent’s efforts, *Parent* has failed to participate in a resolution meeting. Under the IDEA, a parent’s failure to participate in a resolution meeting is justification for dismissal of a due process complaint. 34 C.F.R. § 300.510(b)(4).
5. In addition to the above, a contested case may be dismissed if the Petitioner fails to comply with an interlocutory order of an Administrative Law Judge. 26 NCAC 3 .0014. A due process hearing may be dismissed if Petitioner fails to appear as ordered without prior explanation.
6. Advancement of this case in an expedited manner as specifically requested by Petitioner has been thwarted by Petitioner’s failure to participate in a resolution meeting as required by Federal and State law. Further, the Petitioner has manifested an intention to thwart the progress of this contested case by failure to comply with an order of the Office of Administrative Hearings and failure to appear for the Pre-hearing conference in this matter.
7. The Undersigned has considered actions less drastic for disposing of this contested case and determines that less drastic actions will not suffice. The lack of response to the Office of Administrative Hearings prohibits even an examination by the ALJ of excusable neglect by Petitioner. In accordance with the Federal regulations under IDEA and applicable State law and regulations, disposing of this case by dismissal is appropriate and best serves the interests of justice.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned allows Respondent’s Motion to Dismiss. Disposition of this case by dismissal in accord with Chapter 3 of Title 26 of the North Carolina Administrative Code, and N.C. GEN. STAT. § 150B-33(b)(10) and N.C. GEN. STAT. § 1A-1, Rule 41(b) of the North Carolina Rules of Civil Procedure, as well as the Federal Regulations relating to IDEA cited above, is proper and lawful. It is hereby **ORDERED** that this matter be **DISMISSED without prejudice**.

NOTICE

The North Carolina Department of Public Instruction has notified the Office of Administrative Hearings that a Final Decision based on an Order of Dismissal is not subject to appeal to the NC Department of Public Instruction.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of this Final Decision, Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

IT IS SO ORDERED.

This the 28th day of February, 2008.

Augustus B. Elkins II
Administrative Law Judge